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No. 99-362

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1999

DARRIN L. SHORT, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Respondent's Brief in Opposition grossly misrepresents Petitioner's argument in claiming that Petitioner is asserting that he has a "right to government-funded expert assistance of [his own] choice without a showing of necessity." (Brief in Opposition at 7-8.) In making this inaccurate statement, Respondent mischaracterizes three aspects of Petitioner's position. First, Petitioner does not claim that he is entitled to a "funded" expert[1] in this case. Second, Petitioner does not

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[1] By a "funded" expert, Petitioner refers to a non-government expert who is compensated for his services with appropriated funds.

claim that he is entitled to an expert of his own choosing. Finally, Petitioner does not argue that the requirement for showing "necessity" in order to obtain defense expert assistance no longer exists or should be abandoned. Petitioner merely asserts that, under Article 46, Uniform Code of Military Justice, 10 U.S.C. § 846, when the prosecution is presenting an expert to testify against him regarding complex, scientific evidence[2] that will be material at trial, he is entitled to an independent expert who is unaffiliated with the prosecution to assist him in preparing and presenting his defense. (Pet. 1-5.)

1. With regard to the first two aspects of Respondent's claim, Petitioner ultimately neither requested any funding nor named a specific individual in his request for expert assistance. (R. at 21-24; App. Ex. IV.) Petitioner simply sought the assistance of a urinalysis expert who was **not testifying against him** on behalf of the prosecution for two reasons: 1) to assist him in effectively confronting, cross-examining, and impeaching the main prosecution witness, a drug urinalysis expert, and 2) for purposes of confidentiality. (R. at 22-24.) In fact, defense counsel agreed that an expert from another military drug-testing laboratory would suffice. (App. Ex. IV, sec. III, ¶ 4.) Citing to *United States v. Garries*, 22 M.J. 288, 290-91 (C.M.A. 1986), Respondent acknowledges the difference between the military and civilian systems in requesting

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[2] Petitioner's urine sample allegedly contained 16 nanograms per milliliter of the purported marijuana metabolite. (Pet. App. 2a.) This amount is just one nanogram, or *one billionth of a gram*, per milliliter over the Department of Defense cut-off level for permitting criminal prosecution. This fact wholly supports Petitioner's need for urinalysis expert assistance in this case, as the validity, accuracy, and reliability of the urinalysis testing procedures was the most "significant factor" at Petitioner's trial.

expert assistance. (Br. Opp. n.3). *Garries* explained that since, unlike the civilian defendant, the military accused has the resources of the Government at his disposal, in the "usual case" the expert services available in the military are "sufficient to permit the defense to adequately prepare for trial." *Garries*, 22 M.J. at 290-91; Analysis of Rule for Courts-Martial [R.C.M.] 703(d), Manual for Courts-Martial, United States [M.C.M.] (1998 ed.), Appendix 21 at 21-35. Respondent, however, failed to acknowledge that *Garries* involved a request for funding a non-military private investigator, not a scientific expert already employed by the government. (Pet. n.14.)

Contrary to what Respondent would have this Court believe, Petitioner only asserts that, under the "equal opportunity" clause of Article 46, he was entitled to the "expert services available in the military" described in *Garries*. When the military judge denied Petitioner's motion for an independent government urinalysis expert to assist him in preparing and presenting his defense, Petitioner was denied equal access to the government resources guaranteed to him by Congress under Article 46, as interpreted in *Garries*. Since Petitioner did not insist on a funded, non-government expert, the Court of Appeals for the Armed Forces [hereinafter Court of Appeals] clearly erred when it concluded that Petitioner was not entitled to an independent expert because he "offered nothing to show that [his] case was not the 'the usual case.' " (Pet. App. 8a; Br. Opp. n.3.) Under Article 46 and *Garries*, Petitioner was not required to show that his case was "unusual" in order to obtain the non-funded expert assistance he sought, and the Court of Appeals erred in imposing this excessive burden on him.

2. Significantly, Respondent completely fails to

acknowledge Petitioner's right to "equal opportunity to obtain witnesses" under Article 46, the foundation for Petitioner's argument, anywhere in its brief. (Pet. 3, 5-9; Br. Opp.) Respondent instead attempts to misguide this Court into believing that Petitioner bases his argument on the Fifth Amendment underpinnings of *Ake v. Oklahoma*, 470 U.S. 68 (1985), and that he seeks to expand that holding. (Br. Opp. 6.) In reality, Petitioner only relies on the due process principles of *Ake* insofar as the Court of Appeals heretofore has incorporated them under the military due process provision of Article 46. (Pet. 6.) In his original petition, Petitioner cited not only to *Ake*, but also to other jurisdictions' application of *Ake*, for the proposition that a conflicted expert who is testifying against an accused on behalf of the prosecution cannot be considered "competent" assistance to the defense under either *Ake* or Article 46. (Pet. 10-11, n.8, n.9.) In replying to Respondent's Brief in Opposition, Petitioner simply asserts that a requirement of showing that the prosecution expert's testimony will constitute a "significant factor" in his trial represents the **maximum** standard to which a military defendant can be held in order to demonstrate his need for expert assistance under Congress's plain language in Article 46.

By failing to discuss Article 46 in its Brief in Opposition, Respondent elected to ignore the principal issue presented in this case. Instead, Respondent chose to argue that Petitioner failed to demonstrate "necessity" for the requested independent expert. Unfortunately, Respondent cannot ignore the absence of the "necessity" component in the plain language of Article 46 that it claims Petitioner failed to meet. Congress is not limited to the minimum requirements established by the Constitution in providing servicemembers stronger due process protections than those

found in the civilian sector. *United States v. Manuel*, 43 M.J. 282, 286 (1995); (Pet. n.4). In Article 46 Congress properly has exercised its power to increase the due process protections afforded servicemembers. U.S. Const. art. I, § 8, cl. 14. The President properly has mirrored this grant of increased protections in his promulgation of R.C.M. 703(a) and Military Rule of Evidence [M.R.E.] 706(a). Article 36, Uniform Code of Military Justice, 10 U.S.C. § 836; *see* footnote 4, *infra*. Therefore, Article 46 cannot be interpreted to impose any greater or more difficult burdens on military defendants than Congress and the President intended, or would be imposed on civilian indigent defendants seeking to obtain expert assistance. *See* Article 36, U.C.M.J.; (Pet. 2, n.2).

In this case, the only evidence presented by the prosecution was the results of a highly complex scientific test and the primary prosecution witness was a scientific expert who was required to present that evidence. *See United States v. Campbell*, 50 M.J. 154 (1999); *United States v. Murphy*, 23 M.J. 310, 312 (C.M.A. 1987). Clearly, under the plain language of Article 46 and the lesser constitutional protections provided under *Ake*, Appellant was entitled to an independent, conflict-free expert to assist him in the preparation of his defense. The military judge's failure to provide the defense with the requested independent expert denied Petitioner his right to "equal opportunity to obtain witnesses" under Article 46. As a result, Petitioner was denied his congressionally mandated right to military due process.

3. Concerning the final aspect of Respondent's claim, Petitioner actually asserts 1) that the "necessity" for a defense expert clearly was shown in this case, and 2) that the Court of Appeals again clearly erred in imposing an excessive and misplaced burden on Petitioner to establish

such a showing.[3] Respondent mistakenly defends both lower courts' conclusions that Petitioner failed to demonstrate "necessity" for obtaining independent expert assistance by espousing the three-part test set forth in *United States v. Gonzalez*, 39 M.J. 459 (C.M.A. 1994), to demonstrate the "necessity" component of R.C.M. 703(d). (Br. Opp. 8-9, n.2.) Under *Gonzalez*, a military accused must show why the expert is needed, what the expert would accomplish for the accused, and finally, why the defense counsel is unable to gather and present the evidence that the expert assistant would be able to develop. *Gonzalez*, 39 M.J. at 461. Respondent's focus on the Court of Appeals' application of this test to the case at bar is misplaced for the following reasons.

Like *Garries*, *Gonzalez* involved a request for an independent **investigator**, not a scientific expert to assist the defense in preparing to cross-examine a significant prosecution expert witness, as in the present case. *Id.* at 45-60. Unlike *Garries*, however, *Gonzalez* makes no reference to Article 46. The ruling in *Gonzalez* instead is based solely on the "necessity" requirement of R.C.M. 703(d), which governs requests for funding compensation of non-government expert witnesses.[4] Since the request in

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[3] Petitioner's reply to Respondent's claims on this issue do not alter his original assertions that the prosecution conceded that Petitioner was "entitled to expert assistance" at trial and, therefore, that the Court of Appeals erred in revisiting the "necessity" issue. (Pet. 13-14, n.15.) The military judge did not contest this concession on the record. Instead, the military judge applied a circular and illogical mode of reasoning by justifying his finding that Petitioner failed to demonstrate "necessity" with his finding that the prosecution expert witness was available to consult with defense counsel. (Pet. App. 15a-16a.)

[4] This proposition is clearly supported by the language of M.R.E. 706(a), regarding the "appointment and compensation" of court-

that case was for an investigator vice a scientific expert, and since the "equal opportunity" clause of Article 46 was not at issue, the question of whether requiring the defense to satisfy the test imposed in that case was proper is not germane to the case *sub judice*.[5] However, in a case such as Petitioner's, where a military accused requests independent non-funded government expert assistance because the prosecution is presenting an expert to testify about evidence which will be material at trial, the "equal opportunity" provision of Article 46 clearly controls.

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appointed experts, as well as the Drafters' Analysis of R.C.M. 703(d). In the first sentence of M.R.E. 706(a), the President repeats the "equal opportunity" language of Congress in Article 46 specifically with regard to **expert** witnesses. M.R.E. 706(a), M.C.M. (1998 ed.). The second sentence makes clear that "[t]he employment and compensation of expert witnesses is governed by R.C.M. 703." *Id.* Since the second sentence applies to "compensating" experts in cases where the government does not provide an "adequate substitute" under R.C.M. 703(d), the first sentence clearly applies to the "appointment" of government experts not requiring additional compensation. The President also repeats Congress's "equal opportunity" language in R.C.M. 703(a), and the Drafter's Analysis clearly states that the subsection is "based on Article 46." R.C.M. 703(a); Analysis, M.C.M. (1998 ed.), Appendix 21 at A21-35. Most importantly, however, the drafters further clarify that subsection (d) "does not apply to persons who are government employees or under contract to the Government to provide services which would otherwise fall within this subsection." *Id.* In these rules the President seems to clarify, as the Court of Appeals has been unable to do, that R.C.M. 703—with its "necessity" requirement—only applies in cases where the defense is seeking funding for the employment and compensation of a non-government expert.

[5] Petitioner questions the application of R.C.M. 703(d) in *Gonzalez*, however, since the defense request was for an independent military investigator, not a funded private investigator, and R.C.M. 703(d) clearly pertains to the employment of experts in situations where the government has not provided an "adequate substitute." (Br. Opp. n.2.)

Prior to Petitioner's case, the Court of Appeals' decisions regarding expert scientific witnesses consistently have interpreted Article 46, as well as R.C.M. 703(d), in accordance with the standards set forth in *Ake v. Oklahoma*. *See United States v. Van Horn*, 26 M.J. 434, 436-38 (C.M.A. 1988); *United States v. Burnette*, 29 M.J. 473, 475-76 (C.M.A. 1990); (Pet. 6-7). Since the due process concepts of *Ake* have been applied by military courts with regard to all experts in all cases, the standard for what constitutes "necessity" in *Ake*—that the subject matter of the prosecution expert's testimony will be a "significant factor at trial"—should be the most stringent standard a military accused should have to satisfy in order to obtain expert assistance under the military due process provision of Article 46. *See Manuel*, 43 M.J. at 286; *Garries*, 22 M.J. at 290; (Pet. 5-7, n.4). This argument is strongly supported by, and consistent with, the plain language of Article 46, which contains **no requirement for a showing of "necessity"** in cases where "equal opportunity to obtain witnesses" is at issue. (Pet. 3.) Thus, in a case where the prosecution is presenting expert testimony regarding evidence which is material—or a "significant factor"—at trial, the defense should have an "equal opportunity" to obtain an equally competent expert for assistance in confronting, cross-examining, and impeaching that witness.

In *Burnette*, the Court of Appeals for the Armed Forces seemed to correctly recognize this lesser standard in cases such as Petitioner's when it acknowledged that "very little, if any, showing of necessity [is] required to entitle the defense to expert assistance in the interpretation of drug analyses." *Burnette*, 29 M.J. at 475. *Burnette*, however, involved a request for funding a specified civilian expert at government expense, implicating the "necessity"

requirement under R.C.M. 703(d).[6] *Id.* at 474. Since Petitioner did not insist on a funded, non-government expert in his request, this case is governed by the congressional language of Article 46, not R.C.M. 703(d). *See* footnote 4, *supra*. Therefore, the only burden Petitioner assumed when requesting the independent expert to assist in his defense was demonstrating that the prosecution would be presenting expert testimony concerning a "significant" issue at his trial. Since the prosecution was required under *Murphy*, 23 M.J. 310, to present a urinalysis expert in order to prosecute Petitioner for wrongful drug use, and since the urinalysis test results constituted the prosecution's entire case against him,[7] Petitioner unquestionably satisfied his burden. (Pet. 8-9, 14-17.) By increasing the burden on Petitioner to exceed the *Ake* standard for showing "necessity" in the present case, the Court of Appeals impermissibly incorporated a requirement under Article 46 that was not authorized by Congress or the President. *See* footnote 4, *supra*.

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[6] The absence of reference to either the Fifth Amendment or *Ake* in the Drafter's Analysis of R.C.M. 703(d) indicates that the necessity requirement mentioned in that subsection is not based on either authority. M.C.M. (1998 ed.), Appendix 21 at A21-35.

[7] Petitioner reminds this Court that, under Articles 29 and 52, U.C.M.J., the prosecution may obtain a conviction for wrongful use of marijuana by as few as two out of three court-martial members. 10 U.S.C. §§ 829, 852. This fact further underscores the importance of independent expert assistance for the defense in drug use prosecutions based solely on urinalysis test results.

Conclusion

For the foregoing reasons, and those set forth in the petition, the writ should be granted.

Respectfully submitted,

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